IN THE MATTER OF A GRIEVANCE ARBITRATION BETWEEN

Goodhue County

EMPLOYER

and BMS Case No. 15-PA0346

Law Enforcement Labor Services, Inc.

UNION or "LELS"

ARBITRATOR: Richard J. Dunn

DATE AND PLACE OF HEARING: March 16, 2016, Goodhue County Courthouse

DATE AND RECEIPT OF POST-HEARING BRIEFS: April 8, 2016

DATE OF AWARD: April 25, 2016

ADVOCATES

For the Union:

Mr. Isaac Kaufman, Attorney and General Counsel
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For the Employer:

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JURISDICTION

The parties to this arbitration are Goodhue County, the "Employer", and Law Enforcement Labor Services, Inc, the "Union" or "LELS", who represents the Goodhue County Sherriff's Deputies employed by Goodhue County. LELS represents the grievant, Mr. Matthew Bowron, a Sherriff's Deputy, related to his grievance with the County. The parties are signatories to labor agreements between Goodhue County and Law Enforcement Labor Services, Inc. (Local No. 91) representing Goodhue County Deputies for the periods of January 1, 2014 through December 31, 2014, and January 1, 2015 through December 31, 2016. Article 7 of each of the agreements specifies the grievance procedure and provides for arbitration of disputes between the parties. (Union Exhibit 1, Tab 7, p. 4-5, and Tab 8, p. 4-5)

Originally there were two grievances filed by Sherriff's Deputies over a similar issue concerning injury while on duty. One grievance was filed on April 16, 2014 on behalf of Deputy Matthew Bowron, and the other grievance was filed on March 26, 2015 on behalf of a Detention Deputy under a separate labor contract. The parties agreed to consolidate their grievances, but the Union counsel stated at the hearing that it does not intend to seek any remedy on behalf of the Detention Deputy who resigned employment with the County. Therefore, this arbitration focuses exclusively on Grievant Matthew Bowron's grievance.

LELS began Deputy Bowron's grievance on April 15, 2014, pursued Step 2 on April 24, 2014, and pursued Step 3 on April 29, 2014. (Id. Tab 6) The County responded in writing to deny each step of the Union's grievance. (Id., Tab 4) The County denied the Step 3 grievance on November 18, 2014. (Union Brief, p.6)

LELS General Counsel Isaac Kaufman, the Grievant's legal counsel, wrote to the undersigned on November 12, 2015 advising of his selection by the parties to serve as the neutral arbitrator concerning the grievances. (Union Exhibit 1, Tab 6)

The undersigned Arbitrator conducted the hearing on March 16, 2016 in the Goodhue County Courthouse in Red Wing, Minnesota. Both parties agreed that the case was properly before Arbitrator Richard J. Dunn, and that there were no procedural issues. They also agreed that this is

a final and binding arbitration decision. The designated representatives of both parties received a full and fair hearing, witnesses were sworn and cross-examined, and exhibits were received by the Arbitrator and entered into the record. Each representative filed a post-hearing brief on April 8, 2016.

APPEARANCES

For the Employer

Melissa Cushing, Goodhue County Human Resources Director
Kristine K. Weiss, Goodhue County Sheriff's Office Administrative Assistant

For the LELS

Matthew Bowron, Deputy Sherriff, Goodhue County
Kevin Hinrichs, Former Business Agent, LELS, Inc.
Renee Zachman, Business Agent, LELS, Inc.
Jan Huneke, Steward, LELS, Inc.

I. ISSUE STATEMENT

Each party had their respective statement of the issue. The LELS statement reads:

> Did Goodhue County violate Article 11 of the Collective Bargaining Agreement by failing to pay Deputy Matthew Bowron the difference his Workers Compensation benefits and his regular compensation following a work-related injury, and instead requiring him to use up accrued sick leave?
>
> If so, what is the appropriate remedy?

The County statement reads:

> Did the County violate Article XI of the collective bargaining agreement including the long standing past practice of the parties by allowing the Grievants to utilize accrued paid leave benefits such as sick leave, vacation, and compensatory time to make up the difference between workers compensation benefits and the Grievants' regular rate of pay?

Because the parties did not agree on an issue statement, the undersigned developed the following statement of the issue:

> Did Goodhue County violate Article 11 of the Collective Bargaining Agreement by not paying the Grievant, Deputy Matthew Bowron, wages to make up the difference between the workers compensation benefit and the Grievant's regular rate of pay, and instead following a practice of using accrued paid leave benefits such as sick leave, vacation, and/or compensatory time to fill this gap?
>
> If so, what is the appropriate remedy?

II. RELEVANT LABOR AGREEMENT PROVISIONS

The following are relevant contractual provisions of the Labor Agreement between the County and Law Enforcement Labor Services, Inc (Local No. 91) for relevant years: (Labor Agreement between County of Goodhue and LELS, Local No.91, January 1, 2013 through December 31, 2013, and Labor Agreement between County of Goodhue and LELS, Local No.91, January 1, 2014 through December 31, 2014).) Note that the relevant language of Article 11, Article 15, and Article 22 is the same in both contracts for 2013 and 2014.

> ARTICLE 11 – INJURY ON DUTY
>
> 11.1 In the event an employee is injured on duty without negligence of the employee and while performing their general duties as a Law Enforcement Officer for the EMPLOYER, a leave of absence, with pay (excluding the year and holiday pay), may be granted for a period not to exceed seven hundred twenty (720) work hours beginning with the fourth (4^{th}) day of an injury. The first twenty-four (24) hours of an injury shall be charged to an employee's sick leave account. The amount being paid by the EMPLOYER shall be the difference between Workers' Compensation payments and the employee's regular rate of pay.

ARTICLE 15 – SICK LEAVE

Accumulated paid sick leave may be approved for paid employee absences for the following reasons:

15.41 Because of employee illness or injury which prevents the employee from performing job duties and responsibilities.

ARTICLE 22 – LEAVES OF ABSENCE

22.2 Court Duty. Any employee called and selected for Jury Duty, shall receive regular compensation and other benefits for such duty. Pay received for Jury Duty must be given to the EMPLOYER by the employee. Pay for the expenses may be kept by the employee.

III. FACTS AND BACKGROUND

Deputy Matthew Bowron was conducting a criminal investigation near Zumbrota, Minnesota on March 16, 2014 with his canine partner and suffered a work related injury when he slipped and broke his ankle in an area with icy and uneven terrain. (Testimony of Deputy Bowron) He applied for and was approved to receive a worker compensation benefit which continued until he returned to full duty on or about May 24, 2014. (Id.) This benefit was equivalent to two-thirds (2/3) of his regular wage. He used his accrued sick leave and compensatory time to supplement the workers compensation benefit and make up the difference between the workers compensation benefit and his regular pay. (Testimony of Weiss) This supplement can be referred to as fulfilling the "pay gap". Deputy Bowron used 96.29 hours of sick leave and 3.50 hours of compensatory time to supplement his workers compensation benefit, and received copies of payroll deposit slips depicting this use of leave throughout these payroll periods when he was on leave of absence. (Employer Exhibit 26) (Union Brief, p. 5.)

The Union on behalf of the Grievant on April 15, 2014 filed a grievance alleging a violation of Article 11 of the contract, Injury on Duty. (Union Exhibit One, Tab 6) The 2012-2013 labor contract remained in effect at that time due to protracted negotiations regarding a 2014 contract.

There was subsequently a meeting on May 14 2014 of the parties to discuss how to resolve the grievance. (Testimony of Hinrichs, Testimony of Cushing) Although there were proposals made by the Union to modify past practice, there were no changes to the County's practice of allowing the use of accrued sick leave, vacation and compensatory time to supplement a workers compensation benefit. (Employer Exhibit 32, Union Brief, p. 6) (Note that the County counsel, Human Resources Director Cushing, and Administrative Assistant Weiss referred to this practice as a "required" use of paid leave, whereas in the issue statement the County refers to "allowing" such use. County counsel in conclusion in the County brief twice uses the phrase "…employees have been able to supplement payments….") (Employer Brief, p.1, p.2, p. 4., p. 5., p.14, and testimony of Cushing and Weiss) The County has not allowed employees to receive wages or regular compensation to supplement compensation payments. (Testimony of Cushing and Weiss.) This practice has existed for over 25 years. (Weiss testimony). The County denied Step 3 of the grievance on November 18, 2014.

A previous 2013 grievance arbitration concluded in denial of a grievance seeking to change past practice of not paying employees for injuries on duty to make up the difference between workers compensation and regular pay. The Arbitrator in that case found that the language of Article 11 Injury on Duty was unclear, ambiguous and uncertain. (Goodhue County and Law Enforcement Labor Service, BMS Case Nos. 13-PA-0040 and 13-PA-0651).

LELS Business Agent Hinrichs sent a letter on December 31, 2013 to Human Resources Director Cushing notifying the County that LELS and Local No. 91 no longer intended to recognize the past practice of use of paid leave to supplement workers compensation, and repudiating the past practice. (Union Exhibit One, Tab 3). This was followed by a February 13, 2014 letter from County Administrator Arneson to Hinrichs stating, in part: "If the Union intends to eliminate the past practice, it is incumbent upon the Union to negotiate changes to Article 11, Injury on Duty. (Id., Tab 4) [1]

[1] The Employer also introduced similar, same dated letters between former Business Agent Hinrichs, representing Local No, 78 and County Administrator Arneson, (Employer Exhibits 28 and 29)

IV. POSITIONS OF THE PARTIES

Employer Arguments

Past practice in administration of the Injury on Duty (IOD) provision is a key argument for the County. The County argues that "The past practice of allowing the grievants to utilize accrued paid leave benefits to make up the difference between workers compensation benefits, and the grievant's regular rate of pay is binding and enforceable." (Employer Brief, p. 4.) There is a restatement of the definition and application of a past practice as addressed by the Minnesota Supreme Court, citing in particular five qualities which the Court indicated "distinguish a binding past practice from a course of conduct that has no particular evidentiary significance". (Id., Ramsey County v. American Federation of State, County and Municipal Employees, Council 91, Local 8, 309 N.W. 2d 785 n.3) These qualities include: 1) clarity and consistency, 2) longevity and repetition, 3) acceptability, 4) a consideration of the underlying circumstances, and 5) mutuality. (Id. p. 4) Each of these qualities is addressed in the Employer's brief.

With regard to consistency, the County argues that the jurisdiction has for 25 years clearly and consistently allowed employees to utilize accrued leave benefits to make up the difference in the compensation, including for LELS bargaining unit members and all other County employees. (Testimony of Cushing and Weiss)

With regard to longevity and repetition, the Employer has submitted 24 case examples of workers compensation leaves of absence due to IOD over a 25 year period. The same treatment was administered to all employees in this workers compensation supplement, and no employee has received regular wages or compensation to make up the difference between the employee's workers compensation benefit and regular rate of pay. (Employer Exhibits 1-24 and 26) (Testimony of Weiss)

With regard to consideration of the underlying circumstances and the reliance on the practice such that the practice is binding, the Employer argues that the County's practice regarding this workers compensation supplement arose out of Minnesota Statute 176.021, subd. 5, which specifies that

employers may allow employees to utilize accrued paid leave benefits as a supplement to a workers compensation benefit. (Employer Brief, p. 7.) This supports the idea that the parties relied on the practice as enabled by law, and that the practice is binding.

With regard to the practice establishing acceptance and mutuality, the Employer makes the case that the Union had knowledge of the practice of using accrued paid leave benefits during workers compensation leaves of absence, and acquiesced thereto. The Employer cites a 2012 situation where a Deputy with work-related injuries supplemented his workers compensation benefit with accrued paid leave without filing a grievance. (Employer Exhibit 24) Another case was settled between LELS and the County on a non-precedential basis where a Detention Deputy Sherriff filed a grievance and later resigned his employment, which settlement the County claims does not create an exception to the uniform and consistent practice of the IOD provisions. (Employer Brief, p.8)

The Employer concludes that the language of Article 11 regarding injury on duty is vague, unclear and ambiguous. (Employer Brief, pages 8-11) This argument was also the basis of a previous arbitration decision in 2013, which found that members of the bargaining unit and the Employer testified that the language was "unclear, ambiguous and uncertain", whether suggested by the Agreement or a literal reading of the injury on duty provision. The Employer claims that the facts in the current case are for all material purposes the same as this 2013 arbitration case. (Employer Brief, p. 9 footnote) The County argues that Article 11 language does not state that the Employer will pay wages, nor compensation to employees. Both the Union and the County, it is claimed, have interpreted "with pay" to allow payment through the utilization of accrued leave benefits, including sick leave, paid vacation, and compensatory time but not year-end holiday bank benefits. (Testimony of Cushing)

The Employer argues that the sick leave provision "contemplates" the use of sick leave accruals and is "consistent with the sick leave article" and issue in the case under arbitration. (Employer Brief, p 10.) Again, this Article 15, Sick Leave, reads as follows:

ARTICLE 15 – SICK LEAVE, FUNERAL LEAVE

15.4 Accumulated paid sick leave may be approved for paid employee absences for the following reasons:

15.41 Because of employee illness or injury which prevents the employee from performing job duties and responsibilities.

The Employer cites the Court Duty provision of Article 22, stating that it more explicitly and clearly provides for the payment of regular compensation to an employee during an absence due to jury duty leave. (Id.) This Court Duty provision reads as follows:

ARTICLE 22

22.2 Court Duty. Any employee called and selected for Jury Duty, shall receive regular compensation and other benefits for such duty. Pay received for Jury Duty must be given to the EMPLOYER by the employee. Pay for the expenses may be kept by the employee.

Unlike the language in IOD provisions, this Court Duty language is more "clear and unambiguous" with regard to payment of wages or regular compensation when an employee is on leave for court duty, according to the County. (Employer Brief, p. 11) The County also suggests more clear language. The County concludes by citing the 2013 arbitration rationale that "conduct of the parties may be used to affix a meaning to words and phrases of uncertain meaning". (Goodhue County and Law Enforcement Labor Services, BMS Case Nos. 13-PA-0040 and 13-PA-0651)

The County addresses the issue of proper repudiation of ambiguous contract language. This is an issue where the Union sought to repudiate past practice, and the County argues that proper procedure was not followed in this repudiation of what the County regards as ambiguous contract language. In response to the Union's December 31, 2013 letter repudiating the past practice with regard to injury on duty, the County Administrator, Mr. Scott Arneson, sent a letter on February 13, 2014, where the body of the letter reads as follows: (Union Exhibit One, Tab 4)

I am writing in response to your letter dated January 8, 2014 regarding Article 11 in the LELS #91 (Patrol Deputies and Investigator) contract.

> You stated in your letter LELS Local #91 no longer intends to recognize the past practice of using accrued sick, vacation and compensatory time to supplement the two-thirds Workers Compensation payments. In BMS Case Nos. 13-PA-0040 and 13-PA-0651, Arbitrator Carol Berg O'Toole found that past practice to be binding. She also stated:
>
> > To disturb that long term practice the Agreements language would have to be clarified by the Union and the Employer bargaining teams at the negotiations table.
>
> If the Union intends to eliminate the past practice, it is incumbent upon the Union to negotiate changes to Article 11, Injury on Duty.

The Employer argues that repudiation of past practice associated with ambiguous contract language requires that the party seeking to change past practice has the responsibility to negotiate changes to the contract language. (Employer Brief, p. 12) In support of this, the County cites International Brotherhood of Teamsters Local 1145 and Honeywell International, BMS Case No.090402-55368-3. The arbitrator in this case wrote, in part:

> There is thus a difference between the repudiation of a past practice where the language is ambiguous, and thus reliant upon the practice to give it the meaning the parties intended, versus the repudiation of a practice based upon clear and unambiguous language which may not. In the former instance the parties would need to negotiate different language in order to overcome the practice even where there has been a repudiation of that practice during negotiations by the one party. In the latter instance, unless the parties do negotiate different language, the clear language would overcome the practice where one party has properly repudiated it during negotiations.

The 2013 arbitrator in that case advised the parties that in order to terminate the practice, the language of the contract would need to be changed as a result of negotiations at the bargaining table.

The Employer argues that the County was following the directive of the Arbitrator, when it responded to the Union's December 31, 2013 letter with its own letter of February 13, 2014 indicating that if the Union intended to eliminate the past practice, the Union needed to negotiate changes to Article 11. (Union Exhibit 4, Employer Exhibit 29 and Employer Brief, p. 13) This was an affirmative step on the part of the County, rather than reliance on the Union's arbitral

knowledge of arbitral precedent. (Testimony of Cushing) But the Union did not propose language in the 2014 collective bargaining agreement concerning Article 11, Injury on Duty. (Employer Exhibits 30-31), (Testimony of Hinrichs) (Testimony of Cushing) This is regarded by the County as failure to properly repudiate the past practice, which therefore continues to offer meaning to the unclear language of Article 11. (Employer Brief, p. 14) The Union failed to bargain on this issue, and therefore failed to properly repudiate past practice.

The Employer also argues that the cost of expanding this benefit would be significant because of the Countywide past practice. Because of this and the evidence and foregoing arguments, the County asks that the grievance be dismissed in its entirety. (Employer Brief, p.15)

Argument of the Union

The Union argues that there is plain meaning to the phrase "the amount paid by the EMPLOYER shall be the difference between Worker's Compensation payments and the employee's regular rate of pay". (Union Brief, p. 7.) "Pay" is regarded by the Union as synonymous with "wages", and the Union cites Black's Law Dictionary definition to support this contention. (Black's Law Dictionary at 1128 (6th ed. 1990) Therefore, the Union argues that the County should pay an employee the difference between his/her workers compensation benefit and his/her regular rate of pay in the form of wages. (Union Brief, p. 8.) The Union alleges that in the 2013 arbitration case, the Arbitrator declined to apply the plain language rule when she determined the IOD benefit language is ambiguous and unclear.

Furthermore, the Union contends that the Arbitrator in that case made an "analysis that is erroneous, because "compensation" is synonymous with "pay" and "wages"." (Union Brief, p. 11) The Arbitrator had compared the IOD benefit provision with a provision pertaining to court duty pay in Article 22, section 22.2, which states: "An employee called and selected for Jury Duty, shall receive regular compensation"… The Union argues that the words in Article 11 ("regular rate of pay") are not any less clear that the language of Section 22.2 ("regular compensation") (Id.)

With regard to the typographical error that both parties agree is in Article 11 in the phrase "year and holiday pay", where "and" should be "end", the Union argues that this error does not render an entire contract provision unclear or unenforceable. (Id,)

The Union also argues that the use of sick leave for Deputies recovering from injury due to their performance of job duties and responsibilities, while also providing for use of sick leave for non-duty-related injuries or illnesses, results in fact in no additional benefits for filling the gap between a workers compensation benefit and an employee's regular rate of pay. This violates the contract construction principle that a provision must be read in light of the entire agreement, and should be interpreted to give effect to all parts of the contract, according to the Union. (Id., p. 9) Whereas the contract contains a benefit in Article 11 that applies specifically to duty-related injuries, the County is requiring use of sick leave and other accrued leave to supplement the workers compensation benefit. This use of sick leave is governed by a separate provision, argues the Union. (Id.)

The Union cites that Article 11 refers to "The first 24 hours of an injury shall be charged to an employee's sick leave account." This sentence is construed to mean that after the first 24 hours, there should be no charge to the sick leave account, and that the gap should be paid in the form of wages. The Union invokes the contract interpretation principle of "*exclusion unius est exclusion alterius"* which has served as an arbitral basis for the idea that where certain exceptions are expressed, "that must be taken as an exclusion of other exceptions and guarantees." (Id., p. 10)

The Union further cites testimony of Mr. Hinrichs that the IOD benefit provision is a common provision of law enforcement collective bargaining agreements because society recognizes the inherent danger and elevated risk of duty-related injuries. These injuries frequently result from physical demands of the work. (Testimony of Hinrichs) These physical demands along with the technical dimension of police work may require longer leaves for injured officers relative to leave periods for employees injured in less specialized roles. (Id.)

The Union does not dispute the 2013 Arbitrator's finding that there is a past practice in the County regarding supplementing worker compensation benefits. But it notes that four grievances had been

filed to challenge this practice as a violation of Article 11. (Union Brief, p. 11) The Union cites the following:

> "An impressive line of arbitral thought holds that a practice that is not subject to unilateral termination during the term of the collective bargaining agreement is subject to termination at the end of said term by giving due notice of intent not to carry the practice over to the next agreement; after being so notified, the other party must have the practice written into the agreement to prevent it's discontinuance…… 'In face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding.'" (*How Arbitration Works* at 619)

The Union claims it exercised its right to repudiate the past practice with regard to injury on duty with Mr. Hinrichs' December 31, 2013 letter to Ms. Cushing. (Union Exhibit One, Tab 3, Union Brief, p.12) The body of this letter reads as follows:

> As you are aware when an Employee is injured on duty the County has a past practice of deducting sick time and other benefit time from an Employees accrued time to make up the difference between Workers Compensation payments and the Employee's regular rate of pay. It is the Union's position that this practice is at odds with the language and benefit provided in Article 11 of the Collective Bargaining Agreement between the County and LELS.
>
> This letter is to notify you that LELS Inc. and Local #91 no longer intend to recognize this past practice, and to inform you that the Union does not intend to allow this practice to continue in the future.

Arbitral precedents are cited by LELS in its brief. (Union Brief, p. 12) The Union refutes the idea that the contract IOD language is so ambiguous that negotiations were required to change the agreement. Again they cite the plain language meaning of the IOD provision, which the Union now seeks to enforce. The Union believes it had no obligation to bargain for changes through contract negotiations, given this plain language meaning. (Id. p.13)

Therefore, the Union seeks that the undersigned sustain Deputy Bowron's grievance in its entirety, and that the County should be directed to reimburse him for the approximately 96 hours of sick leave that was used to supplement his Workers Compensation benefit from approximately March 16 through May 24, 2014. (Union Brief, p. 13)

V. DISCUSSION AND OPINION

The parties to this dispute have sought final and binding arbitration to resolve a festering issue in the Goodhue County Sherriff's Department that relates to the filing of four grievances by this LELS Bargaining Unit and its members. Deputy Bowron challenges the practice of requiring use of paid leave, rather than regular wages, to make up the difference between the workers compensation benefit and the regular rate of pay of a Deputy Sherriff. There remains some different representations as to whether the County *requires* the use of paid leave, or *allows* the employee to choose whether to use paid leave to fill the gap. In their issue statement, the County counsel in the Employer Brief refers to "allowing the Grievants to utilize accrued paid leave benefits…" whereas other parts of the brief refer to "requiring use of accrued paid leave".

In the current injury on duty case focusing on Deputy Bowron, the Union does not dispute the finding that the County had established a past practice of use of paid leave up until the expiration of the 2012-2013 collective bargaining agreement. But this grievance adds evidence that matters have changed since the previous arbitration on a similar issue. [2]

The May 28, 2013 decision by the Arbitrator in a similar case stated that past practice was "accepted" with regard to use of paid leave, as a result of injury on duty, in order to make up the difference between a workers compensation benefit and regular pay. (Goodhue County and Law Enforcement Labor Services, BMS Case No. 13-PA-0040, O'Toole 2013) The Arbitrator described the Union as inactive in grieving this provision of the contract as a violation. But these numerous grievances over the last few years, as well as the LELS recent activity and December 31, 2013 repudiation of past practice now run counter to the idea that Deputies and the LELS are

[2] The traditional concepts and past benefit practices concerning paid leave are changing in the American workplace. Grievants in the Sherriff's Department are demanding they be compensated with wages rather than accrued paid leave such as sick leave for the difference between workers compensation pay and wages regularly earned. Employees in today's workforce are motivated to preserve accrued paid leave for the purposes they deem important in their family lives. In other public jurisdictions and in the private sector, new paid leave benefits practices are emerging that are important to attraction and retention of employees by employers. This may explain part of the motivation underlying employee and union activity in this area.

"acquiescent in the practice of supplementing workers compensation pay with an employee's accrued leave". And as stated in *How Arbitration Works,* "A party's failure to file grievances or to protest past violations of a clear contract rule does not bar that party, after notice to the violator, from insisting upon compliance with the clear contract requirement in future cases." *How Arbitration Works,* Elkouri and Elkouri, Third Edtion, p. 409.

After the December 31, 2013 letter sent by Business Agent Kevin Hinrichs to Human Resources Director Melissa Cushing repudiating past practice as at odds with the language of Article 11 and indicating that Local No, 91 "no longer intends to recognize this past practice, and to inform you that the Union does not intend to allow this practice to continue in the future", and after these grievances, there is no longer a mutual understanding as to the way of operating with regard to this use of paid leave in the future. There is neither acceptability or mutuality regarding past practice. Repudiation of the past practice was effective for reasons discussed below. Therefore, an objection has been raised as to a longstanding past practice in the use of paid leave to fill this gap between the workers compensation benefits and regular pay for leaves of absence due to injury on duty. There is neither acquiescence or mutual understanding for the future regarding this past practice in the Goodhue County Sherriff's Department.

Furthermore, the Arbitrator in the previous similar case stated that "To disturb that long term practice, the Agreements language would have to be clarified by the Union and Employer bargaining teams at the negotiations table". (Goodhue County and Law Enforcement Labor Services, BMS Case No 13-PA-0640, O'Toole 2013) But the parties did not develop a mutual understanding on this issue during the last negotiations for the contract for the period January 1, 2015 through December 31, 2016, despite that conclusion from the Arbitrator in 2013 that they needed to do so. At the hearing there were contradictory representations as to whether there were serious negotiations, proposals and responses with regard to matters in this Article. There was no new contract language. The parties did not even correct the typographical error in Article 11, Injury on Duty, section 11.1, where there seems to be agreement by both parties that the word

"and" should be replaced with "end".[3]

The County counsel during the hearing introduced 24 individual cases over the last 25 plus years of injury on duty and use of paid leave in the Sherriff's Department. These cases show consistent past practice treatment of these individuals using paid leave to fill the gap. A review of these cases also presents evidence that ten (10) of these situations involved injuries during job training. The cases indicate the significant physical exertion, prevalence of injuries, health risk, dangers and hazardous job duty involved in these law enforcement jobs, both during performance of regular job duties, and during training. Deputies perform law enforcement field work duties that are distinctly susceptible to dangers, physical risk, possible injury and hazards.

Former Business Agent Hinrichs testified that there were two primary purposes of the Injury on Duty provision in law enforcement contracts. First he indicated that "because of the high probability of injury keeping law enforcement personnel away from their active duty, there is a need for a buffer to preserve sick leave to some extent." He went on to say that requiring the burning of sick leave benefits causes high usage. Second, Hinrichs testified that law enforcement is a physical job, and prone to injury. "Going on to workers compensation causes financial hardship. There is a need to support officers emotionally and financially. If an injured officer goes back to work, they are likely to incur injury again." (Testimony of Hinrichs) It is in this context that the Sherriff's Deputies are filing these grievances involving injury on duty.

In interpreting Article 11, Injury on Duty, section 11.1, it is helpful to define terms and draw distinctions among the compensation-related terms used. There are several references that help to clarify the meaning of these terms. These include definitions from the Fair Labor Standards Act, World at Work, which is the professional association of compensation practitioners, Black's Law Dictionary, terms and phrases used by actuaries and compensation professionals, and terms and phrases used by unions, managers, actuaries and others as described below.

[3] With regard to this likely typographical error, it does not affect the meaning of the paragraph with regard to pay for the difference between a workers compensation benefit and the regular rate of pay. It is a longstanding practice that employees in the County have not been allowed to access their year-end holiday bank.

The undersigned has over 35 years of experience using compensation and benefits terms and phrases in public jurisdictions, private sector companies and union situations. Among these numerous employers and unions, the term "pay" means "wages" and "salaries". This term " pay" is used in Article 11 as in "a leave of absence, with pay….." . Black's Law Dictionary defines "pay" as a synonym for "wages". (Black's Law Dictionary at 1128 (6th Ed. 1990) The World at Work Association defines "base pay" as "fixed compensation typically paid as a salary, hourly or piece rate". (See WorldatWork.com, Glossary) The "individual pay rate" is defined as the "wage and salary level assigned to an individual". (Id.) The phrase "regular rate of pay" is also a part of Article 11. Regular rate of pay is defined by the Fair Labor Standards Act as "the amount of compensation that is used to calculate overtime rates. The regular rate of pay includes the base rate, shift premium, piece rate, pay allowances and bonuses." These definitions and references to "pay" and "regular rate of pay" do not mention "employee benefits".

In contrast to "pay", "benefits" typically refers to welfare benefits (most commonly benefits focused on medical, dental, short and long term disability, life insurance), retirement benefits, workers compensation and leave with pay benefits such as sick leave, vacation, compensatory time and bereavement leave. Actuaries, compensation professionals, union members, managers and legal counsel typically distinguish between "pay" and "benefits" when referencing wages and salaries, in contrast to health, dental, life insurance and disability benefits, leave with pay, workers compensation benefits and retirement benefits. When cost accountants roll up the various costs of employment, they typically use a category for "time not worked benefits" under the general category of benefits. Benefits such as "time not worked benefits" are regarded as indirect compensation, not direct compensation or wages or salaries or pay.

Article 11 refers to "The amount being paid by the EMPLOYER shall be the difference between Workers Compensation payments and the employee's regular rate of pay." Wages and salaries can be measured and characterized by with the word "amount". It is common parlance to refer to the amount of pay. This is in contrast to the term "benefits" which is measured and characterized by terms such as "cost" or "value" but not "amount". Sick leave is measured, for example, by a "number" of days, not an amount of days. It is not common to refer to the amount of benefits, but

rather, the cost or value of benefits. Employee benefit actuaries measure employee benefits with an analysis of the "cost" or the "value" which they place on a benefit. Many employers explain this when they produce annual individual employee benefit statements for communications about employee benefits in terms of "value" to the participant. "Amount" in this context presented in Article 11 should be interpreted to refer to wages and salaries, not paid leave - which is not measured or characterized as an amount. "The amount being paid…." refers to the amount of pay in the form of wages or salaries that should be paid during the leave of absence.

Another way to support this concept of pay is to look at references to "pay mix". When referring to the mix of pay, this reference is to "the profile of various components of direct pay expressed as a percentage of the total (e.g. 50 percent in base pay salary, 35 percent attributable to short term incentives, 15 percent to long term incentives). (WorldatWork.com, Glossary) Again this terminology supports the point that employee benefits are not typically included in any reference to "pay".

From these references to terms and phrases, the undersigned concludes that the meaning of Article 11 is clear and unambiguous. Pay refers to wages and salaries. The phrase "with pay" means that the County should have paid Deputy Bowron wages for the difference between workers compensation pay and regular pay during his leave of absence due to injury on duty. These definitions of terms and clarifying of phrases help to establish plain meaning relative to Article 11. As stated in *How Arbitration Works, "*While custom and past practice are used very frequently to establish the intent of contract provisions which are so ambiguous or so general as to be capable of different interpretations, they ordinarily will not be used to give meaning to a provision which is clear and unambiguous." *How Arbitration Works*, Elkouri and Elkouri, Third Edition, p. 408.

In further support of this line of reasoning that the pay gap should be treated through wages rather than leave benefits, Article 11 also expressly specifies that "The first twenty-four (24) hours of an injury shall be charged to an employee's sick leave account." The County requires that paid leave be used for injury on duty leaves to make up the gap with workers compensation. The Article 11 reference to the first twenty-four (24) hours of sick leave usage would seem superfluous if

additional hours also require sick leave or other leave usage, rather than some other form of compensation such as wages or salaries to compensate for the pay gap.

While the County argues that an award for the Grievant would be significantly costly if applied to the members of the Bargaining Unit and other employees in the County, no cost estimate was offered or entered into the record of this proceeding. (Employer Brief, p. 15) Based on the approximately 24 individual cases submitted over 25 plus years, there would not be an extraordinarily large case load annually. And this decision does not apply to employees engaged in bargaining units beyond this one, nor to different lines of work in the County. This Injury on Duty pay decision would therefore not necessarily greatly expand the benefit.

There is an issue with the practice of using wages to make up the pay gap. Depending on the treatment of wage deductions, paying wages could result in higher net income during Injury on Duty than during regular hours worked. Deputy Bowron indicated in testimony at the hearing that it was not his intent to derive greater compensation during his leave for Injury on Duty than during regular work schedules. The County can make the appropriate pay deductions and calculate the amount of net income comparable during the two circumstances, and should limit pay by the amount of regular wages that would have been earned by Deputy Bowron had he not take a leave of absence.

While the LELS argues that it is not obligated to bargain on this matter after repudiating the past practice, it would be in the best interests of sound labor relations for the parties to meet and confer regarding administrative details of this payment practice going forward for cases of Injury on Duty.

Again the circumstances in the Sherriff's Deputy case are distinctly different from other employment situations and numerous other jobs which do not involve exposure to injuries, dangers and hazards. This arbitration case should not serve as a precedent for other bargaining units where the job situation is unlike this case.

VI. THE AWARD

For the above reasons, the grievance is sustained. The County violated Article 11 of the 2014 Labor Agreement, Injury on Duty provision, when it did not pay wages to Deputy Bowron for the difference between the workers compensation benefit and his regular rate of wages after the Union had effectively repudiated past practice administration of the plain language of the Article.

In order to remedy this violation, the County should credit the Grievant with the sick leave hours and compensatory time previously used by Deputy Bowron, and reimburse the Grievant for the number of hours of sick leave and compensatory time that were used during his leave of absence in March, April and May 2014 based on his pay rate that was then in effect, up to a maximum of seven hundred twenty (720) work hours. This reimbursement amount should not exceed the net pay that would have occurred after payroll deductions if wages had been paid, or any wages that were paid for light duty, rather than sick pay and compensatory time used to fill the pay gap.

In the interest of sound labor relations, the parties should meet and confer regarding the administration of leave of absence pay for Injury On Duty circumstances, consistent with this award, and correct any typographical errors in Article 11 and Article 15 of the contract.

Issued and Awarded this 25th day of April 2016

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Richard J. Dunn
Labor Arbitrator